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Message Text

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TO AMEMBASSY BONN
INFO SECSTATE WASHDC 0538
AMEMBASSY LONDON
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AMEMBASSY PARIS

C O N F I D E N T I A L SECTION 1 OF 2 USBERLIN 0361

E.O. 11652: GDS
TAGS: PGOV, WB, GW
SUBJECT: ABORTION LAW CONTROVERSY

REF: USBERLIN 342

1. BEGIN UNCLASSIFIED: SUMMARY: FOLLOWING MESSAGE SUMMARIZES EXISTING LAW ON ABORTION IN BERLIN AND FRG IN LIGHT OF FEDERAL CONSTITUTIONAL COURT DECISION OF FEBRUARY 25. IT INDICATES THAT BECAUSE OF MANNER IN WHICH BERLIN LAW IS APPLIED, BERLINERS WILL SUFFER NO PRACTICAL DIFFICULTIES FROM THEORETICAL DISUNITY WITH FEDERAL LAW IN THIS INSTANCE. SENAT CAN BE EXPECTED, HOWEVER, TO CONTINUE TO PRESS ALLIES FOR RESOLUTION OF THEORETICAL PROBLEM WHICH IT SEES AS WEAKENING BASIC BERLIN-FRG TIE. END SUMMARY.

2. PRIOR TO ADOPTION OF ABORTION REFORM LAW IN JUNE 1974, ARTICLE 218 OF CRIMINAL CODE WAS APPLICABLE EQUALLY IN BERLIN AND FRG AND PROVIDED THAT ANY PERSON UNDERGOING OR PERFORMING ABORTION WAS LIABLE TO FIVE YEAR JAIL SENTENCE. LAST YEAR'S REFORM LAW, WHICH WAS NOT TAKEN OVER IN BERLIN, REDUCED MAXIMUM SENTENCE IN FRG TO THREE YEARS AND PROVIDED THAT THERE WAS NO CRIMINAL
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PENALTY IF ABORTION PERFORMED BY DOCTOR WITH CONSENT OF

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WOMAN WITHIN FIRST TWELVE WEEKS OF PREGNANCY. ADDITIONALLY, IT PROVIDED THAT THERE SHOULD BE NO CRIMINAL PENALTY IF ABORTION PERFORMED BY DOCTOR WITH WOMAN'S CONSENT AFTER FIRST TWELVE WEEKS IF (A) THERE WAS RISK TO LIFE OF MOTHER OR DANGER OF SERIOUS DAMAGE TO MOTHER'S HEALTH IN CONTINUATION OF PREGNANCY, OR (B) THERE WERE COMPELLING REASONS TO CONCLUDE THAT FETUS WAS IMPAIRED BECAUSE OF HEREDITARY OR DAMAGING OUTSIDE FACTOR SUCH AS DRUG TAKEN BY WOMAN AFTER INCEPTION.

3. KARLSRUHE COURT TEMPORARY INJUNCTION OF JUNE 21, 1974 SUSPENDED ENTRANCE INTO FORCE OF ABORTION ON DEMAND AND MADE STANDARDS DESCRIBED ABOVE TEST FOR DETERMINING WHETHER LEGAL ABORTION COULD BE PERFORMED IN FIRST TWELVE WEEKS. COURT ALSO TOOK NOVEL STEP OF LEGISLATING ON OWN AUTHORITY THAT LEGAL ABORTION COULD BE PERFORMED IN FIRST TWELVE WEEKS WHEN PREGNANCY RESULTED FROM RAPE. KARLSRUHE DECISION OF FEBRUARY 25, 1975 DECLARED ABORTION ON DEMAND WITHOUT CONSIDERATION OF SPECIAL FACTORS UNCONSTITUTIONAL AND PROVIDED THAT, PENDING DEVELOPMENT OF NEW LAW THAT MET TEST OF CONSTITUTIONALITY, ABORTION WOULD BE PERMITTED IN FIRST TWELVE WEEKS OF PREGNANCY WHEN THERE WAS (A) THREAT TO MOTHER'S LIFE OR RISK OF SERIOUS DAMAGE TO MOTHER'S HEALTH ("MEDICAL INDICATION"); (B) COMPELLING REASON TO CONCLUDE THAT FETUS WAS IMPAIRED ("MEDICAL-ORGANIC INDICATION"); (C) PREGNANCY WAS RESULT OF RAPE ("ETHICAL INDICATION"); OR ABORTION WAS NECESSARY TO SAVE WOMAN FROM DANGER OF EMERGENCY SITUATION ("SOCIAL INDICATION"). LATER TWO CONTINGENCIES WERE ESSENTIALLY NEW STANDARDS DEVELOPED BY COURT IN APPARENT EFFORT TO PROVIDE COMPROMISE BETWEEN ABORTION ON DEMAND AND ABORTION ONLY IN MORE STRINGENTLY DEFINED CIRCUMSTANCES ENVISAGED BY BUNDESTAG SUBSEQUENT TO TWELFTH WEEK.

4. SINCE BERLIN HAS NOT ADOPTED ABORTION REFORM LAW AND CONSTITUTIONAL COURT DECISION IS NOT BINDING ON IT, PRE-1974 FIVE YEAR CRIMINAL PENALTY FOR ABORTIONS REMAINS ON BOOKS. THROUGH OTHER LAWS AND PROCEDURES, HOWEVER, ACTUAL SITUATION HERE IS IN FACT MORE LIBERAL THAN IN CONFIDENTIAL

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MOST IF NOT ALL OF FRG. MEDICAL AND MEDICAL-ORGANIC INDICATIONS DESCRIBED PARA 3 ABOVE HAVE BEEN APPLIED HERE FOR MAY YEARS AS RESULT OF DECISIONS OF BUNDESGERICHTSHOF THAT, PURSUANT TO "COMMON LAW" AND DOCTRINE OF SUPRA-LEGAL EMERGENCY ("UEBERGESETZLICHES NOTSTAND") THERE SHOULD BE NO CRIMINAL PUNISHMENT FOR ABORTIONS PERFORMED WHEN MOTHER' SLIFE OR HEALTH IS IN QUESTION OR THERE ARE COMPELLING GROUNDS TO BELIEVE FETUS IS DEFECTIVE. PRO-

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CEDURE USED TO IMPLEMENT THIS COMMON LAW SUPRA-LEGAL EMERGENCY EXCEPTION ON BOTH FRG AND BERLIN PRIOR TO PASSAGE OF 1974 LAW WAS FOR WOMAN TO SUBMIT APPLICATION TO LOCAL DOCTORS' CHAMBER (AERZTEKAMMER) WHICH WOULD RULE ON WHETHER MEDICAL OR MEDICAL-ORGANIC INDICATIONS FOR ABORTION WERE PRESENT. IN BERLIN APPROXIMATELY 5800 APPLICATIONS FOR LEGAL ABORTIONS WERE FILED IN 1974 AND APPROXIMATELY 95 PERCENT WERE APPROVED. DEPENDING UPON SOCIAL-ETHICAL VIEWS OF DOCTORS' CHAMBERS, PERCENTAGE OF APPROVED APPLICATIONS VARIED FAIRLY WIDELY THROUGHOUT FRG EVEN THOUGH SAME STANDARDS THEORETICALLY WERE APPLIED

5. AT PRESENT TIME, THEREFORE, BERLIN APPLIES MEDICAL AND MEDICAL-ORGANIC INDICATIONS WHICH KARLSRUHE HAS APPROVED FOR FRG. IT DOES NOT HAVE ETHICAL OR SOCIAL INDICATIONS WHICH KARLSRUHE HAS LEGISLATED FOR FRG, BUT, GIVEN LIBERAL ATTITUDE OF BERLIN DOCTORS'S CHAMBER, IT IS UNLIKELY THIS DISCREPANCY WILL RESULT IN DISAPPROVALS OF APPLICATIONS FOR ABORTIONS IN BERLIN THAT WOULD HAVE BEEN APPROVED UNDER THOSE ADDITIONAL STANDARDS IN FRG. AS ADDITIONAL GUARANTEE THAT THERE WILL BE NO PRACTICAL EFFECT FROM REFORM LAW AND COURT'S DECISION NOT APPLYING TO BERLIN, SENATOR FOR JUSTICE KORBER HAS INDICATED

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ACTION EUR-12

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C O N F I D E N T I A L SECTION 2 OF 2 USBERLIN 0361

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THAT HE WILL MAINTAIN INSTRUCTIONS TO HIS
PROSECUTORS NOT TO USE CRIMINAL LAW AGAINST
DOCTORS WHO CONDUCT ABORTIONS HERE.

6. BEGIN CONFIDENTIAL: ON PRACTICAL GROUNDS, THEREFORE,
IT WOULD APPEAR THAT BERLIN CAN AWAIT PASSAGE OF NEW
ABORTION REFORM LAW WHICH COURT HAS INDICATED SHOULD BE
DRAFTED AND WHICH FEDERAL GOVERNMENT APPARENTLY INTENDS
TO SEEK. SENAT CAN BE EXPECTED, HOWEVER, TO SEEK FRG
ASSISTANCE IN ENCOURAGING ALLIES TO PROVIDE MUTUALLY
AGREEABLE MEANS BY WHICH BERLIN HOUSE CAN ADOPT JUNE 1974
REFORM AND TAKE ACCOUNT OF COURT'S FEBRUARY 25 DECISION
ON TWO GROUNDS: (A) THERE IS THEORETICAL DISPARITY

BETWEEN BERLIN AND FRG LAW WHICH RAISES POINT OF
PRINCIPLE ON LEGAL UNITY, WHICH SENAT CONSIDERS BASIC TIE
TO FRG: (B) NOW THAT KARLSRUHE HAS DEMONSTRATED IT IS
PREPARED TO INTERVENE EVEN BEFORE CONTROVERSIAL
LEGISLATION COMES INTO FORCE AND TO DEVISE ITS OWN
LEGISLATIVE MODIFICATIONS RATHER THAN SIMPLY DECLARING
LAW CONSTITUTIONAL OR UNCONSTITUTIONAL, THERE SHOULD BE
AGREED PROCEDURE FOR HANDLING FUTURE CASES WHICH
CAN BE PERCIEVED ON HORIZON SUCH AS MITBESTIMMUNG. WE
WOULD NOT WISH TO UNDERESTIMATE PSYCHOLOGICAL IMPORTANCE
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TO BERLINERS OF FIRST POINT GIVEN SENSITIVITIES THAT
ARE ALWAYS PRESENT HERE WHEN THERE IS REAL OR PERCEIVED
DANGER THAT CITY IS BEING ISOLATED FROM FRG. WE WOULD
ALSO AGREE THAT IT IS DESIRABLE TO DEVISE AGREED PRO-
CEDURE FOR DEALING WITH FUTURE TROUBLES, PRACTICAL
SOLUTIONS FOR WHICH MAY NOT BE SO RELATIVELY EASY TO
COME BY ON BASIS OF EXISTING LAWS AS IN ABORTION CASE.
QUESTION IS LARGELY ONE, AS WE SEE IT, OF GIVING SENAT
AND FRG ASSISTANCE ON WHAT THEY CONSIDER IMPORTANT MATTER
IF WE DO NOT HARM BASIC ALLIED INTERESTS IN SO DOING.
BECAUSE OF SPECIAL CIRCUMSTANCES EXISTING IN ABORTION
CASE, (INCLUDING FACT THAT COURT'S DECISION IN EFFECT
APPROVED STANDARDS APPLIED IN BERLIN), HOWEVER, DO-NOTHING
POLICY APPARENTLY FAVORED BY FRENCH, THOUGH PERHAPS
REGRETTABLE, CAN BE LIVED WITH. AS INDICATED
REFTEL, THEREFORE, WE CONSIDER OUR PRESENT
POSITION SHOULD BE TO ALLOW TIME FOR FRG TO DETERMINE
WHETHER THERE IS ANY GIVE IN FRENCH POSITION. IF
THERE IS NOT, WE SHOULD SEEK TO AVOID DEVELOPMENT OF
SITUATION IN WHICH SENAT OR FRG MIGHT BE TEMPTED
TO RAISE PUBLIC ALARUMS OF CRISIS BY TAKING OPPORTUNITY
TO ASSURE SENAT AND FRG THAT WE ARE AT LEAST SYMPATHETIC
TO THEIR SENSITIVITITES AND PREPARED TO HELP THEM WITH
ANY PRACTICAL PROBLEMS THAT MAY ARISE IN FUTURE.GEORGE

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